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No. 82-502

In the Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the acceptance by an injured longshoreman of voluntarily paid compensation and the subsequent filing of Form LS-206 and Form LS-208 by his employer with the deputy commissioner, signifying the commencement and termination of payments, triggers the assignment provisions of section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act.
2. Whether, under the circumstances of this case, there is a conflict of interest between the injured longshoreman and his employer which precludes the operation of the assignment provisions of section 33(b) of the Act.

LIST OF ALL PARTIES

Joseph Duris - Plaintiff-Appellant

Erato Shipping, Incorporated;

Japan Line Limited;

Regent Botan Shipping, Inc.;

Pallas Shipping Agency, Ltd. - Defendants-Appellees

Joseph Duris is the Respondent herein. Pallas Shipping Agency, Ltd. is the sole Petitioner herein.

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OPINIONS BELOW

The opinion of the District Court entered on March 24, 1981, is unreported but is reproduced in the Joint Appendix at page 36. The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 684 F.2d 352 and is reproduced in the Joint Appendix at page 39.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The decision of the Court of Appeals for the Sixth Circuit was entered on July 16, 1982. The petition for a writ of certiorari was filed on September 20, 1982, and was granted on November 15, 1982.

STATUTES INVOLVED

The statutes involved are material parts of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C. § 901, et seq., as amended. Title 33 U.S.C. § 933(a), as amended, provides:

> "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."

Title 33 U.S.C. § 933(b), as amended, provides:

> "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person *unless such person shall commence an action against such third person within six months after such award.*" (Emphasis supplied.)

STATEMENT OF THE CASE

On February 19, 1980, the respondent filed a complaint alleging personal injuries sustained as a result of an accident which occurred at Toledo, Ohio, on May 19, 1975, while he was working as a longshoreman aboard the M/V Regent Botan. In the complaint the named defendants were Erato Shipping, Inc., the bareboat charterer of the vessel at the time of the alleged injury; Japan Line Limited, the time charterer of the vessel at the time of the alleged injury, and Regent Botan Shipping, Inc., the owner of the vessel at the time of the alleged injury. On April 8, 1980, respondent filed an amended complaint naming Pallas Shipping Agency, Ltd., the survivor corporation of a merger between Erato Shipping, Inc. and Pallas Shipping Agency, Ltd., which took place in Monrovia, Liberia, on October 27, 1977 (Joint App. 36).

On October 10, 1980, the District Court granted the motion to dismiss Japan Line Limited on the ground that, as time charterer, it could not be held liable as a matter of law and the judgment of dismissal was filed on October 16, 1980. On March 25, 1981, the District Court dismissed Regent Botan Shipping, Inc., and Erato Shipping, Inc., on the ground that neither had been properly served. In ruling on the Motion to Quash Service filed by Pallas Shipping Agency, Ltd., the District Court held that it was not subject to service under Ohio's long-arm statute (Joint App. 36, 37). On March 25, 1981, the District Court entered judgment dismissing the action without prejudice (Joint App. 38). The appeal taken by the respondent was confined to the dismissal of Pallas Shipping Agency, Ltd.

On July 16, 1982, the Court below filed its opinion reversing and remanding. It ruled that where the long-

shoreman accepted voluntarily paid compensation benefits, no assignment occurred under section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act and that the longshoreman could gain jurisdiction over a corporation which merged with the corporation which had bareboat chartered the vessel upon which he was injured if he could establish Ohio contacts sufficient to gain jurisdiction over the charterer.

Compensation benefits were voluntarily paid to respondent commencing on June 2, 1975, as indicated by Form LS-206 (Joint App. 48).

The payment of compensation was terminated as indicated by the filing of Form LS-208 with the Department of Labor on April 26, 1977 (Joint App. 49).

The question presented in the petition for writ of certiorari which was filed on September 20, 1982, was confined to the ruling of the Court below on the non-assignment of the cause of action to the respondent's employer. Its ruling on the issue of securing jurisdiction over the petitioner is not before this Court.

Certiorari was granted herein on November 15, 1982.

SUMMARY OF ARGUMENT

The voluntary payment of compensation benefits to the respondent, plus the acceptance and filing by the Bureau of Employees Compensation, U.S. Department of Labor, of Form LS-206 and Form LS-208 constituted an "award in a compensation order" under 33 U.S.C. § 933(b) of the Longshoremen's and Harbor Workers' Compensation Act. The respondent's rights against the petitioner were assigned by operation of law to his employer and the filing of an amended complaint against respondent on April 8, 1980, almost three years after the payment of the last compensation benefit, was beyond the six-month limitation period of 33 U.S.C. § 933(b).

This Court ruled in *Czaplicki v. The Hoegh Silvercloud, et al.*, 351 U.S. 525 (1956), that under the conflict of interest situation which existed in that case there was an exception to the assignment provision in 33 U.S.C. § 933(b) and the longshoreman's suit against the vessel owner and others, after the six-month period, was valid. No such conflict of interest exists here. Even if it be presumed that the employer-assignee would be reluctant to pursue the assigned remedy against the alleged tortfeasor, this is not the type of conflict of interest which vitiates the assignment mandated by the provisions of 33 U.S.C. § 933(b). When Congress enacted the 1959 amendments to this provision of the statute, it had in mind the natural reluctance of the stevedore-employer to sue its customer and the six-month limitation period is controlling unless a conflict of interest as delineated by *Czaplicki* is present.

ARGUMENT

I. THE RULING OF THE COURT BELOW THAT NO ASSIGNMENT OF THE RESPONDENT'S CAUSE OF ACTION AGAINST THE PETITIONER OCCURRED UNDER THE PROVISIONS OF 33 U.S.C. § 933(b) IS ERRONEOUS AND SHOULD BE REVERSED.

(a) The Voluntary Payment of Compensation Benefits to the Respondent, Plus the Acceptance and Filing by the Bureau of Employees Compensation, U.S. Department of Labor, of Form LS-206 and Form LS-208 Constituted an "Award in a Compensation Order" Under 33 U.S.C. § 933(b). The Respondent's Rights Against the Petitioner Were Assigned by Operation of Law to His Employer.

The purpose of the 1959 amendments, as they relate to 33 U.S.C. § 933(b), is set forth in SENATE REPORT 428 [To accompany H.R. 451], 86th Congress, 1st Session, *reprinted in* 1959 U.S. & ADMIN. NEWS, p. 2135. The report states:

> "The bill as amended by the committee would revise section 33 of the act so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation under the act. The principle underlying the modification of the law made by this bill, is embodied in most modern State workmen's compensation laws. The committee believes that in theory and practice this is a sound approach to what has been a difficult problem. As embodied in the committee amendment, the principle

would be applied with due recognition of the equities and rights of all who are involved.

"Although an employee could receive compensation under the act and for the same injury recover damages in a third-party suit, he would not be entitled to double compensation. The bill, as amended, provides that an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery. *In the event that an employee does not elect to sue for damages within 6 months of the compensation award the employer is assigned the cause of action.* In the event that the employer institutes proceedings and makes a recovery, the employee receives four-fifths of the amount after necessary expenses, approved by the Deputy Commissioner, and all benefits and compensation have been deducted. *Thus by giving the employer a reasonable (one-fifth) share in the net recovery an incentive is provided not to compromise a suit only for the amount of compensation but to protect the interests of the employees as much as possible.*" (Emphasis supplied.)

In HOUSE REPORT No. 229 [To accompany H.R. 451], 86th Congress, 1st Session, *reprinted in* 1959 U.S. CODE & ADMIN. NEWS, p. 314, it is stated:

"Such a person will be able to commence his remedy at law at any time [within] 6 months after the compensation order or within 9 months after the enactment of any new laws creating, establishing, or affording a new or additional remedy. If the employee or other person entitled to compensation on his behalf receives any funds in a civil action, through settlement, or otherwise, the employer or his insurance carrier will have a lien on such funds to the extent of

the total amount of compensation awarded under, or provided, or estimated, by this act for such case and the expenses for medical treatment.

"Subsection (b) provides that if, in the situation referred to above, the employee or his survivors or legal representatives do not commence action against the third person within the time limit set forth above, the failure will operate to assign the cause of action to the employer or his insurance carrier if the employer or his insurance carrier has given notice to the employee or other person entitled to compensation that his failure to commence action will operate as an assignment of the cause of action. If the employer or his insurance carrier doesn't give such notice until after a date at least 30 days from the last date on which he may commence the action, the period during which he may commence the action will be extended for 30 days after he has received the notice. If he hasn't begun the action by then, his failure will then operate to assign the cause of action to the employer or his insurance carrier."

The Senate, in its REPORT No. 428, *supra*, did not follow HOUSE REPORT 229, *supra*, relating to the obligation of the employer or its insurance carrier to give notice to the employee, at least 30 days from the last date on which he may commence an action against a third party, that the failure to do so will operate as an assignment of the cause of action and that if such notice is not given, it will extend the right to bring the third-party action for 30 days after the notice is received.

In ruling on the issue of the assignment of the respondent's claim under 33 U.S.C. § 933(b), the Court below stated (Joint App. 46):

"We will not, therefore read section 33 to encompass all claims, paid under the Act. Where, as here, the injured employee has merely accepted compensation payments, no assignment occurs and the third party claim does not expire in six months. The Second Circuit gave due consideration to the policy against unwitting assignments and reached a similar conclusion. Rodriguez v. Compass Shipping Co. Ltd., 617 F.2d 955 (1980), aff'd. on other grounds, 451 U.S. 596, 101 S.Ct. 1945, 68 L.Ed.2d 472 (1981).

"Our holding today is that the mere receipt of compensation benefits does not trigger the assignment provisions of section 33(b). Hence Duris' claim is not time barred. See generally Dunbar v. Retla Steamship Co., 484 F.Supp. 1308 (E.D. Penn. 1980)"

The foundation of the above ruling appears to be that before an assignment to the employer can occur there must be "an award in a compensation order" and that this phrase must be strictly construed. The Court below declined to follow the ruling of federal courts, one of which held that the mere receipt of compensation benefits constituted an "award" under the statute, and the other of which ruled that the payment of benefits, plus the filing of documents which must accompany those payments, are sufficient "ratification and acceptance to constitute a formal award." (Joint App. 41).

In the case at bar the voluntary payment of compensation benefits is undisputed. There is nothing in the opinion of the Court below which indicates that any consideration was given to the fact that Form LS-206 and Form LS-208 had been filed with the Bureau of Employees Compensation, Department of Labor. The exclusion of the respondent's claim from the assignment provisions of 33 U.S.C. § 933(b) without consideration of these doc-

uments is erroneous and contrary to persuasive federal authorities.

In *Liberty Mutual Ins. Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977), the insurer of the stevedore-employer brought an action against the shipowner and injured longshoreman who was paid benefits under the Longshoremen's and Harbor Workers' Compensation Act but who also obtained a voluntary settlement from the shipowner whose alleged negligence caused the injury to the longshoreman. The District Court entered judgment in favor of the insurer for $1,000 which represented settlement proceeds but found in favor of the shipowner and longshoreman with respect to the remainder of the insurer's lien. The insurer appealed and the shipowner and longshoreman cross-appealed. In ruling on the assignment provisions of 33 U.S.C. § 933(b), the Court of Appeals stated (p. 1101):

> "The liability of the shipowner to the insurance carrier turns in part upon whether there was an 'award' under the Act. The shipowner contends that since Melson received compensation voluntarily, without a formal award, then under 33 U.S.C. § 933(b), 933(d), and 933(h), there was no assignment to the stevedoring co. and thence to the insurance carrier of Melson's rights against the shipowner to seek recovery for the personal injuries sustained by Melson. The insurance carrier contends: (1) that a formal award is not necessary under the Act - all that is required is payment and acceptance of compensation; (2) that the various documents filed in this case with the Bureau of Employees Compensation, U.S. Department of Labor, collectively constitute an "award" under the Act where the deputy commissioner has received and reviewed them; * * *"

At page 1103 the Court continued:

> "In this case, the numerous documents set forth above in footnote 10 all were duly received, filed and accepted by the deputy commissioner, Bureau of Employees Compensation, U. S. Department of Labor. *Compensation payments were made and thereafter terminated pursuant to these documents. We hold that the documents set forth in footnote 10 above constituted sufficient affirmative action and a determination by the deputy commissioner granting benefits to Melson so as to constitute an "award" of benefits in a compensation order* under 33 U.S.C. § 933(b) *without the entry of a formal award. Melson's rights against third parties were assigned by operation of law to his employer, the stevedoring co., 33 U.S.C. § 933(b), and thereafter subrogated by operation of law to the insurance carrier.* 33 U.S.C. § 933 (h)." (Emphasis supplied.)

The documents referred to in footnote 10 in the above case were as follows (p. 1101):

(a) Form BEC-202 - Employer's First Report of Accident or Occupational Illness;

(b) Form BEC-206 - Payment of Compensation Without Award;

(c) Form No. 6 - Attending Physician's Report;

(d) Form BEC-208 - Compensation Stopped or Suspended.

Forms under (b) and (d) were filed in the instant case. Proof that those under (a) and (c) were filed is not in this record because of the posture of this litigation in the District Court which involved a dismissal of the

cause of action by the District Court on jurisdictional grounds without reaching the issue on the merits.

This Court has given recent consideration to the assignment provisions of 33 U.S.C. § 933(b). In *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596, 101 S. Ct. 1945, 68 L. Ed. 2d 472 (1981), the question presented was whether the longshoreman could prosecute his personal injury action against the shipowner after his right to recover damages had been assigned to his employer by operation of the above-mentioned statute. This Court held that where the three longshoremen filed their actions against third parties well beyond the six-month period following acceptance of compensation and offered no excuse for their delay, they could not prosecute the actions after the right to recover damages had been assigned to their employers by the terms of the Longshoremen's and Harbor Workers' Compensation Act, and that it was not material that the employers failed to pursue the assigned claims.

Each of the petitioners in the above case was a longshoreman who was injured aboard ship in the regular course of his employment. In the *Rodriguez* and *Barulec* cases the petitioners and their employers agreed to settlements in informal conferences convened by the Office of Workers' Compensation Programs. The other petitioner did not contend in the District Court that he had not accepted "compensation under an award," within the meaning of § 933(b). The District Court concluded that the settlement agreements reached after official informal conferences were equivalent to formal orders for the purposes of § 33(b) and this ruling was affirmed on appeal. See 617 F.2d at 958-960. No formal orders were entered. Although petitioners challenged this ruling in their petition for certiorari, the order granting the petition did not

extend to this question. This Court, for the purpose of its decision, assumed that the acceptance of compensation operated as an assignment under § 33(b).

This Court, speaking through Mr. Justice Stevens, had this to say concerning the assignment provisions of § 33(b), at page 1950:

> "The language of § 33(b) is both mandatory and unequivocal. It provides that the acceptance of compensation under an award '*shall operate* as an assignment to the employer of *all right* of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.' 33 U.S.C. § 933(b). (Emphasis supplied by Court)
>
> "The only conditions precedent to the statutory assignment are the acceptance of compensation pursuant to an award in a compensation order and the passage of the required period of 6 months. These conditions are admittedly satisfied in these cases. The statutory assignment encompasses 'all right' of the employee to recover damages from a third party. * * *"

In referring to SENATE REPORT No. 428, *supra*, and HOUSE REPORT No. 229, *supra*, this Court clearly adopted the proposition that the limitation period is six months. In *Rodriguez v. Compass Shipping Co., Ltd., supra*, it said at page 1954:

> "Nothing in the 1959 Amendments purports to preserve the employee's right to commence a third-party suit after the 6-month period expires. Although the Amendments encourage employers to pursue assigned claims, *they do not qualify the assignee's con-*

trol of the cause of action after the assignment takes place. To the contrary, the legislative history indicates that once the 6-month period expires, the employer possesses complete control of third-party claims." (Emphasis supplied.)

It is clear from the ruling in this case that the entry of a formal award in a compensation order is not required to support an assignment under § 933(b). The primary question that remains is whether, assuming the absence of a formal award, the acceptance of compensation by the petitioner and the filing of documents by the employer with the deputy commissioner satisfies the requirements of the statute.

In the case of *Simmons v. Sea-Land Services*, 676 F.2d 106 (4th Cir. 1982), *cert. den.* 103 S. Ct. 242, the longshoremen brought actions against the allegedly negligent shipowners. The District Court granted summary judgment to the defendants. The longshoremen appealed and the Court of Appeals held that the longshoreman who accepts compensation under an award in a compensation order has six months to bring an action against a third party and that failure to do so operates as an assignment of his claim to his employer or its subrogee; that where the employer, not having disputed its liability, voluntarily pays compensation to the longshoreman which is accepted and notice thereof is filed with the deputy commissioner, the six-month limitation period in the statute is started without regard to subsequent suspensions of payments or formal awards of benefits. In addressing itself to the question of what constitutes "an award in a compensation order," the Court said (p. 109):

"Having determined that Section 933(b) contemplates an informal award, we next turn to the req-

uisites of such an award. As revealed by the facts of these cases, a number of events may occur during the disability period which could be interpreted as the culmination of an informal award. *However, as we stated in Ameta, the essence of an award is 'an act of ratification of compensation, whether formal or informal, and the subsequent acceptance by the claimant.'* 564 F.2d at 1102. In addition, the award must serve the dual purpose of protecting the welfare and rights of the longshoreman while not unduly delaying the employer's access to relief from the negligent third party.

"With these concepts in mind, we hold that 'an award in a compensation order' is created by the completion of three events: (1) *the employer, having not contravened its liability, initiates compensation payments to the longshoreman;* (2) *the deputy commissioner files the employer's notice that compensation payments have been initiated;* and (3) *the longshoreman accepts any of the payments.* Such an award triggers the six-month period without regard to subsequent suspensions in payment or formal awards of benefits. We believe that this rule will foster the prompt payment of benefits by eliminating the need for perfunctory contravention by the employer, and will provide the employer with access to its remedies within a reasonable time. As in all such cases, the six-month period will protect the longshoreman by giving him an opportunity to investigate and weigh his options." (Emphasis supplied.)

In the above case the longshoremen, because of the failure of their employers to pursue their third-party claims, contended that the claims were reassigned to them by their employers. The Court of Appeals affirmed the

ruling of the District Court that the purported reassignments were invalid as the Longshoremen's and Harbor Workers' Compensation Act did not sanction reassignments (p. 110).

The three "events" set forth above were all completed in the case at bar. The employer voluntarily initiated payment of compensation benefits which were accepted by the respondent, and the employer, by the filing of LS-206, gave notice that the payments had been initiated. Clearly, the "award in a compensation order" existed and the assignment provisions of the statute were operative.

In *Ambrosino v. Transoceanic S. S. Co., Ltd.*, 675 F.2d 470 (2d Cir. 1982), two longshoremen appealed from a judgment of the District Court dismissing their suits against the vessel owner for injuries sustained in the course of their employment. Both received compensation benefits as a result of the filing of Memoranda of Informal Conferences. The Court of Appeals ruled that where the longshoremen failed to bring suit within six months after acceptance of compensation there resulted an assignment of their causes of actions to their employers who thereafter had the exclusive right to pursue the third-party claims against the shipowner and that a different result was not mandated by amendments to regulations made in connection with the Longshoremen's and Harbor Workers' Compensation Act. The Court, in ruling on the assignment issue, stated (p. 471):

> "The undisputed facts are that each plaintiff accepted from his employer, the stevedore, compensation for his permanent disability following an informal conference convened by a United States Department of Labor claims examiner in the Office of Workers' Compensation Programs (OWCP). In each case, the

Department issued a Memorandum of Informal Conference, but no formal compensation order was entered and no party requested such an order. *Both plaintiffs brought suit in district court more than six months after they accepted payment from their employer.* In the *Ambrosino* case, the complaint was dismissed after defendant's answer and oral motion to dismiss; in the *Cigliano* case, defendant's motion for summary judgment was granted. In both cases, the district court relied on our decision in *Rodriguez*, supra, and disposed of the claim on the same ground: *The longshoreman's failure to bring suit within six months after acceptance of a compensation award resulted in an assignment of his cause of action to his employer, who thereafter had the exclusive right to pursue the third-party claim against the shipowner, 33 U.S.C. § 933(b).*" (Emphasis supplied.)

The Court rejected the appellants' contention that, based upon the provisions of 20 C.F.R. § 705.312, no compensation order had been issued because the claims examiners had not been designated by the Director to perform that duty (675 F.2d at pages 471 and 472).

The Court below specifically declined to follow *Liberty Mutual Ins. Company v. Ameta & Co., supra,* and *Larson v. Associated Container Transp. (Australia),* 459 F. Supp. 561 (E.D. Va. 1978) (Joint App. 41). The *Liberty Mutual* case having been previously discussed, we now proceed to a consideration of the *Larson* decision.

The *Larson* case involved an action brought by a longshoreman against the shipowner claiming that his injuries were caused by a condition on the vessel brought about by negligence of the crew. On defendant's motion for a summary judgment, the Court held that payments of benefits under the Longshoremen's and Harbor Workers'

Compensation Act, with the requisite filing of documents and reports with the United States Department of Labor, and the acceptance of those payments by the longshoreman, started the running of the six-month period under the statute and the longshoreman's suit, initiated beyond that period was untimely. In addressing the questions of whether an "award" was made and whether an assignment of plaintiff's claim had taken place, the Court stated (p. 562):

> "The crux of the issue in this case turns on a determination of if, and when, an 'award' was made. Plaintiff relies on *Liberty Mutual Insurance Company v. Ameta & Company*, 564 F.2d 1097 (4th Cir. 1977), *wherein the court held that an 'award' need not be a formal award to bring about a statutory assignment of rights under section 33(b).* Rather the crucial factor in determining whether an award has been made is whether there has been 'some act of ratification of compensation, whether formal or informal, and the subsequent acceptance of compensation by the claimant.' *Id.* at 1102." (Emphasis supplied.)

At page 563 the Court continued:

> "Under the holding of *Liberty Mutual* and the facts of this case, there are at least three possible events that could be deemed to constitute an informal award so as to commence the running of the six-month period: the initial payment of compensation and acceptance by the injured longshoreman; the termination of the payment of compensation by the employer; and some event intervening between these other two occurrences."

Finally, after discussing the philosophy behind the statute with particular reference to the 1959 amendment, the Court ruled as follows (p. 564):

"Thus the Court concludes that the payment of benefits under the LHWCA with the requisite filing of documents and reports with U.S. Department of Labor and the acceptance of those payments by the plaintiff *started the six-month period of section 33(b) to run.* That these filings, payments and acceptance of compensation should be deemed to constitute an informal award so as to begin the six-month period is buttressed further by the provisions of sections 14(h), (i). 33 U.S.C. §§ 914(h), (i). *Under those sections, the deputy commissioner at any time in a case in which payments are being made without a formal award may take such action necessary, including requiring an employer to deposit monies with the United States, to secure payment of compensation to the injured person.*" (Emphasis supplied.)

The refusal of the Court below to follow *Liberty Mutual* and *Larson* arose out of its strict and narrow construction of the "award" provision of 33 U.S.C. § 933 (b). Its ruling in that connection is manifestly erroneous.

The tendency of recent decisions to "consider the realities of the situation" rather than requiring a strict construction of the statute is illustrated in the case of *Francavilla v. Bank Line, Ltd.*, 470 F. Supp. 94 (D.C.S.D. N.Y. 1979). There the longshoreman, injured on the defendant's vessel, filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act. He received compensation from his employer, which included payment for temporary disability as well as a lump sum payment for permanent disability. At an informal conference held before a claims examiner the amount agreed upon to be paid to the plaintiff was arrived at and the total paid was set forth in a memorandum filed by the claims examiner. A little more than two

years later the suit against the vessel owner was filed. In ruling on the issue of what constitutes an "award," the Court said (p. 96):

> "• • • Indeed, it appears that concern for the harsh consequences of such an automatic assignment may have motivated the Courts of the *Grasso* era to strictly construe the meaning of an award in a compensation order. *See, e.g., Sessa v. Weeks Stevedoring Co.*, 56 F.Supp. 50, 51 (S.D.N.Y. 1943). Today, of course, a claimant who accepts benefits pursuant to an award has six months within which to commence its action against the third party. 33 U.S.C. § 933(b). *Thus, the rationale for the Grasso line of cases may have lost some of the force of years past. In fact, it appears that the most recently decided cases in the area have opted for a liberal reading of what constitutes an award. See Liberty Mutual Insurance Company v. Ameta and Co.*, 564 F.2d 1097 (4th Cir. 1977); *Rodriguez v. Compass Shipping Ltd.*, 456 F.Supp. 1014 (S.D.N.Y. 1978). • • •" (Emphasis supplied.)

The Court, at page 97, said this in connection with the "realities of the situation":

> "In determining whether compensation has been received under an award, a Court must concern itself with 'the realities of the situation,' rather than with 'the labels employed.' *Sabol v. Merritt Chapman & Scott Corporation*, 241 F.2d 765 (2d Cir. 1957). In this case a memorandum was filed reflecting the agreement of the parties, payments were made and the case was closed by the filing of the appropriate form with the Bureau of Employees Compensation, U.S. Department of Labor. All these affirmative acts, in my view, are sufficient to constitute an award within the meaning of section 933(b)."

Other decisions which discuss the assignment issue are:

Collins v. Norfolk Shipbuilding & Drydock Co., 522 F. Supp. 1211 (U.S.D.C. E.D. Va. 1981);

Panzella v. Skou, 471 F. Supp. 303 (D.C.S.D. N.Y. 1979);

Oman v. Johns-Manville Corp., 482 F. Supp. 1060 (D.C.E.D. Va. 1980);

Barriero v. Meriuienti O/Y, 495 F. Supp. 193 (D.C. S.D. N.Y. 1980).

One of the "realities" in the instant case is the fact that during the time that the stevedore-employer was paying compensation and the petitioner was accepting it he was represented by competent counsel. Payment of compensation benefits was terminated on April 26, 1977, by the filing of Form LS-208 and Duris was represented by counsel on April 12, 1977 (Joint App. 4). It must be assumed that from that time on he was fully advised as to his third-party rights. The record here is barren of any reason why the assignment provisions of 33 U.S.C. § 933(b) should not be enforced.

(b) There Is No Conflict of Interest in the Instant Case Between the Respondent and His Employer Which, Under the Doctrine of the Czaplicki Case, Would Validate the Filing of the Third-Party Action Beyond the Six-Month Period.

It is apparent that the Court below, in ruling that the respondent's suit was not statutorily assigned, was greatly influenced by the doctrine of conflict of interest. The Court, in declining to accept the argument that the Act

provided an incentive to the employer by permitting it to keep twenty percent of any recovery over the costs of litigation and all compensation due, said (Joint App. 45):

> "This analysis loses its appeal, however, if we *consider the very real threat of conflicting interests between employer and employee.*
>
> "As noted earlier, the most likely third party tortfeasor will be the vessel owner or charterer, the owner or lessee of the longshoreman's workplace. *On the other hand, the employer-assignee* is by definition a stevedoring contractor whose clients are those very same shipowners or charterers. *The juxtaposing of this stevedore-client relationship between the employee and the tort-feasor presents obvious disincentives to the bringing of the employee's action by the employer.* If the employer-assignee depends to any significant degree upon the shipowner or charterer for future business, the probability that it will enforce the rights of its injured employee against the third party-client is reduced. Nor will the likely imposition of the employer's carrier-subrogee between it and the third party-client alleviate the conflict. The insurance company can hardly ignore the business relationships of its own clients. *This conflict of interest problem makes us hesitate to countenance any interpretation of the Act which would expand the assignment provisions of section 33.* If in fact the employer is unlikely to vindicate the rights of the employee, an assignment becomes increasingly similar to the harsher legal doctrine of election of remedies. Such a substantive reinterpretation of the statute lies far beyond the power of this court." (Emphasis supplied.)

This Court in *Czaplicki v. The Hoegh Silvercloud, et al.*, 351 U.S. 525 (1956), validated a late suit by the

longshoreman against the vessel, her owners, her operators and the contractor who built the steps which collapsed, causing the involved injuries. Payments of compensation made under an award by a Deputy Commissioner were made by an insurer who had insured both the employer and the contractor. This Court ruled that under 33(b), petitioner's acceptance of the award had the effect of assigning his rights of action against third parties to his employer, to whom the insurer was subrogated; but that the longshoreman was not precluded from bringing his action in the circumstances of this case because his rights were held by the insurer—the party most likely to suffer from the enforcement of those rights.

Not only this Court, but numerous lower federal courts, have interpreted the ruling in *Czaplicki* as being confined to the circumstances of that case.

In *Rodriguez v. Compass Shipping Co., Ltd., supra,* this Court stated at pages 1951 and 1952:

> "In 1956, this Court held that an injured longshoreman could enforce his right of action against a third party, notwithstanding his acceptance of compensation from his employer. *Czaplicki v. The Hoegh Silvercloud,* 351 U.S. 525, 76 S.Ct. 946, 100 L.Ed. 1387. In that case, both the employer and the third party allegedly responsible for the unseaworthy condition that had caused the employee's injury were insured by the Travelers Insurance Company. *Because the stevedore had no interest in recovering the compensation payments that had been made by its insurance carrier, and because that carrier would be responsible for both prosecuting and defending any third-party claim, no one other than the injured longshoreman had a sufficient interest in the claim to bring suit.*

Because of the conflict between the assignee's interest and the interest of the employee, the Court construed the Act to allow the longshoreman to enforce the third-party claim in his own name. *The Court did not hold that no assignment had occurred; rather, it held that under 'the peculiar facts' of the case, the election and consequent assignment did not bar the employee's action.*" (Emphasis supplied.)

This Court considered the effect of the 1959 amendment on the conflict of interests issue and, at pages 1954 and 1955, stated:

"This history forecloses the argument that Congress did not intend an assignment of a third-party claim to be effective unless there was an absence of any potential conflict of interest between the assignee and the longshoreman. The statutory language provides a different and clearly defined solution to the conflict of interest problem that had been created by *Ryan Stevedoring. Congress unequivocally made the choice in favor of first giving the employee exclusive control of the cause of action for a 6-month period and then giving the employer exclusive control thereafter, instead of opting for any form of simultaneous joint or partial control. The simple standard set forth in § 33(b) protects the interests of both employees and employers, and is consistent with the general policy of the Act to encourage the prompt and efficient administration of compensation claims.* See *Potomac Electric Power Co. v. DWCP*, ... U.S. ....., ..., 101 S. Ct. 509, 516, 66 L.Ed.2d 446." (Emphasis supplied.)

In *Hernandez v. Costa Armatori S.p.A, Pia Costa*, 467 F. Supp. 1064 (E.D. N.Y. 1959), *aff'd* 622 F.2d 573

(2d Cir. 1980), the question of conflict of interest was exhaustively considered. It involved a suit by a longshoreman to recover for injuries sustained while employed by a stevedore on defendant's vessel. The defendant moved for summary judgment, asserting that plaintiff's claim had been assigned to the stevedore by operation of law since the plaintiff did not bring the action within six months after the acceptance of payments under an award in a compensation order. The Court held that "(1) the deputy commissioner may delegate the power to make an effective award satisfying the provisions of the statute and (2) *while plaintiff alleged that a 'conflict of interest' existed between himself and the stevedore such that he should be permitted to prosecute his action against the shipowner, plaintiff referred only to conflicts of interest of which Congress was aware in enacting the statute, to wit, a claim that the stevedore was reluctant to bring an action against the vessel owner for fear of damaging customer relationships, and a claim that the employer, as assignee, had a motive to urge, in an action against a third party, a disability no greater than that found in the compensation proceedings.*" 467 F. Supp. at page 1064 (Emphasis supplied.)

The District Court, in addressing itself to both issues, said at page 1065:

> "Plaintiff contends that he has not lost his right to sue because (1) the settlement agreement was not an 'award in a compensation order filed by the deputy commissioner or Board' and there was no assignment and (2) that, even assuming an assignment, there is such a conflict between plaintiff's interests and those of the assignee-employer that he should be allowed to prosecute the action."

The Court continued on page 1066:

> "The purpose of the 1938 amendment requiring 'an award in a compensation order' before acceptance would be deemed an assignment was evidently to cause the employee to focus on the consequences of acceptance. Presumably he would thus be aware of his loss of the right to bring suit against a third party. *See H.R.Report No. 1945, 75th Cong., 3rd Sess. (1938). The courts held that to accomplish this end it was sufficient that there be 'some official action' by the deputy commissioner and that entry of a formal order was not required. Grasso v. Lorentzen*, 149 F.2d 127, 128-129 (2d Cir.), *cert. denied*, 326 U.S., 743, 66 S.Ct. 57, 90 L.Ed. 444 (1945). *See also Toomey v. Waterman S.S. Corp.*, 123 F.2d 718, 721 (2d Cir. 1941)." (Emphasis supplied.)

In concentrating on the "conflict of interest" question, and with particular reference to the decision of *Czaplicki, supra*, the Court, at page 1066, stated:

> "Czaplicki sued, among others, a contractor who had constructed the steps that caused his injury. *The compensation carrier subrogated to the employer's rights (see Section 933(h)) also insured the contractor. There was thus no motive for the insurer as assignee to pursue the claim against the contractor. The assignee obviously had no interest in suing in effect itself.*" (Emphasis supplied.)

> "In order to enable Czaplicki to protect his interest in the claim the Supreme Court read a 'conflict of interest' exception into the absolute statutory language providing that acceptance 'shall operate' as an assignment. As the Supreme Court said, 'Czaplicki's rights of action were held by the party most likely

to suffer were the rights of action to be successfully enforced.' *Id.* at 530, 76 S.Ct. at 949. *The Court held that the Act 'presupposes that the assignee's interests will not be in conflict with those of the employee' and permitted the plaintiff 'to enforce, in his own name, the rights of action that were his originally.' Id.* at 531, 76 S.Ct. at 950." (Emphasis supplied.)

The Court in the *Hernandez* case ruled that the *Czaplicki* exception had not been abolished but, at page 1067, went on to say:

"However, it does not follow that the Act should be construed to allow every potential conflict of interest between the employee and the assignee to vitiate the assignment. *Here plaintiff claims that the stevedore was naturally reluctant to bring action against the vessel owner for 'fear of damaging customer relationships.' But this is not the kind of matter that Congress could have viewed as sufficient to invalidate the assignment. Such a conflict has always been inherent in the statutory scheme. Presumably every stevedore would prefer not to give offense to its customer.*" (Emphasis supplied.)

This Court in *Rodriguez, supra*, declined to accept the rule that *Czaplicki* applies whenever a potential conflict of interest is present and, at 101 S. Ct. 1956, n.34, cites the *Hernandez* case, *supra*, with approval. It said:

"Petitioners suggest that such an automatic rule is justified because of a stevedore's normal reluctance to file suit against a customer. However, in rejecting a similar conflict of interest argument, the District Court in *Hernandez v. Costa Armatori, S.p.A.*, 467 F. Supp. 1064 (EDNY 1979), aff'd 622 F.2d 573 (CA2 1980), identified the flaw in this reasoning:

> '[T]his is not the kind of matter that Congress could have viewed as sufficient to invalidate the assignment. Such a conflict has always been inherent in the statutory scheme. Presumably every stevedore would prefer not to give offense to its customer.' "

The Court below, in the instant case, in considering the "conflict of interest" issue, has "painted with a broad brush." In applying it to the classical relationship between longshoreman and stevedore, which is the situation here, it has totally disregarded the narrowness of the *Czaplicki* exception.

The completeness of the assignment to the employer under 33(b) and the effect of the *Czaplick.* exception upon an attempted reassignment of the claim to the longshoreman was decided by the District Court in *Bandy v. Bank Line, Ltd.*, 518 F. Supp. 1229 (D.C.E.D. Va. 1981), upon remand from the Court of Appeals. In that case an action was brought by an injured longshoreman to recover for injuries sustained on the defendant's vessel. The United States District Court for the Eastern District of Virginia, at Norfolk, 442 F. Supp. 882, entered summary judgment in favor of the vessel owner and an appeal was taken. The Court of Appeals, 618 F.2d 1037, vacated and remanded. On remand the District Court ruled that once the cause of action was assigned to the employer under section 33(b) it did not revest in the longshoreman simply because the employer failed to pursue the claim.

The Court overruled the defendant's second Motion for Summary Judgment to permit the longshoreman to present evidence concerning any conflict of interest. When the plaintiff offered no further evidence on that issue, the Court stated (p. 1230):

"On April 7, 1978, the defendant filed a second Motion for Summary Judgment, contending that the plaintiff had not sought any discovery or presented any issues of fact with respect to the conflict of interest. The plaintiff thereafter advised this Court that he had no further evidence to present on this issue. Accordingly, following a review of the file, we found no evidence of a conflict of interest and granted the defendant's Motion for Summary Judgment *because, under the statute, the plaintiff's delay in filing suit of more than six months after the termination of the compensation benefits resulted in an exclusive assignment of his right of action to his employer.*" (Emphasis supplied.)

On page 1231 the Court continued:

"The issue in *Rodriguez* was 'what, if any, right the longshoreman has against the third-party shipowner if he does not sue within the six-month period and the employer fails to do so thereafter,' ..... U.S. at ....., 101 S.Ct. at 1949, precisely the issue addressed by the Fourth Circuit in *Caldwell*. After an exhaustive examination of the legislative history of the Act, preceded by the *caveat* that '"absent a clearly expressed legislative intention to the contrary, the [statutory] language must ordinarily be regarded as conclusive."' ..... S.Ct. at 1951 (citation omitted), the Court essentially found that the longshoreman's right to file suit was completely cut off unless he could prove a conflict of interest as delineated by *Czaplicki*."

The final conclusions of the Court, as set forth at page 1233, are as follows:

"In sum, we FIND that the exclusive right to the instant cause of action was assigned to the plain-

tiff's employer under section 33(b) of the Act. *Moreover, under Rodriguez, a reassignment of the action can occur only if evidence of a conflict of interest, as delineated in Czaplicki, is present; the simple failure of the employer to prosecute the claim is not enough. The record contains no evidence of a Czaplicki type of conflict.* Moreover, the assignment executed by American and delivered to the plaintiff is ineffective. Accordingly, the defendant's Motion for Summary Judgment is GRANTED and the plaintiff's Complaint is DISMISSED." (Emphasis supplied.)

In the case of *Perez v. Arya National Shipping Line, Ltd.*, 468 F. Supp. 799 (D.C.S.D. N.Y. 1979), an injured longshoreman who had accepted compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act brought an action for damages against the shipowner. The Court ruled that the longshoreman, and not the shipowner, bore the burden of proof on the issue of whether there was such a conflict between the interests of the longshoreman and the interests of his employer as would permit the longshoreman to bring an action against the shipowner more than six months after accepting an award of compensation benefits. The accident occurred in August 1973. In March 1975 the Workmen's Compensation Board entered the compensation order and the suit was filed fifteen months later.

The Court, in giving consideration to the question of whether the cause of action was statutorily assigned and the effect of the *Czaplicki* exception, said (page 800):

"As amended in 1959, section 33(b) of the LHWCA provides:

'Acceptance of such compensation under an award in a compensation order filed by the deputy com-

> missioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.'

33 U.S.C. § 933(b). The shipowner moves to dismiss the complaint on the grounds that since Perez did not commence this action within six months of the Board's award, his cause of action was assigned to his employer, and he cannot maintain this suit. In response Perez cites *Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525, 76 S.Ct. 946, 100 L.Ed. 1387 (1956), which carved an exception to the mandate of section 33(b). The principal question presented here is not whether the exception remains viable, but who bears the burden of proving whether it applies or not in a given case.

• • • • •

"Until the amendment of the LHWCA in 1959, the employee lost his right to sue immediately upon accepting compensation under an award, rather than six months later. See Pub.L.No. 86-171, 73 Stat. 391 (1959). This was the situation when the Supreme Court rendered its decision in Czaplicki. Noting that '[i]n giving the assignee exclusive control over the right of action . . . the statute presupposes that the assignee's interests will not be in conflict with those of the employee, and that through action of the assignee the employee will obtain his share of the proceeds of the right of action, if there is a recovery,' the Court construed section 33(b) as allowing an employee to sue in his own name 'where there is

such a conflict of interests [and] the inaction of the assignee operates to defeat the employee's interest in any possible recovery.' *Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525, 531, 76 S.Ct. 946, 950, 100 L.Ed. 1387 (1956)." (Emphasis supplied.)

In further discussing the application of the conflict of interest doctrine, the Court, at page 801, said:

"* * * The solicitude towards employees reflected in the liberal application of the conflict of interest exception in cases such as *Potomac Electric Power Co. v. Wynn* can be attributed largely to the unavoidable conflict of interest created by that doctrine. *In view of the 1972 amendments, such solicitude is no longer warranted. Finally, the 1972 amendments substantially increased the compensation payable to an injured longshoreman. Id.* § 5(a) (*codified at 33 U.S.C.* § *906*). *The compensation now available to a longshoreman is more nearly commensurate with his actual damages, and consequently it is appropriate to require the longshoreman to demonstrate his right to sue after he has already received compensation.*" (Emphasis supplied.)

The Court, in rejecting the contention by Perez that the assignment of his claim to his employer contravenes the purposes of the Act because it deprives him of his claim against third parties and indirectly indemnifies the third party, said (p. 802):

"Whatever first-blush appeal these arguments may have, on reflection they are unpersuasive. First, whatever the consequences of a failure to sue, an employee who fails to sue within six months of accepting compensation under an award of the Workmen's Compen-

sation Board is as responsible for that failure as an employer who neglects, for whatever reason, to pursue an assigned claim. Second, an employer's failure to recover from a third party for the third party's negligence is not the same thing as an employer's indemnifying a third party on the basis of the employer's own negligence or breach of warranty. *The 1972 amendments were intended to ensure that employers would not be liable, not that third parties would be. Finally, there is no reason to assume that an employer's failure to sue necessarily reflects a breach of an obligation, if any exists, to husband its resources. On the contrary, such a failure may mean merely that the chances of winning the case are too remote to warrant suit.*" (Emphasis supplied.)

The defendant's motion to dismiss was denied without prejudice to renewal after forty-five days.

When the *Rodriguez* case was before the United States Court of Appeals, consideration to the conflict of interest issue was given. *Rodriguez v. Compass Shipping Co., Ltd.*, 617 F.2d 955 (2d Cir., 1980). In considering the effect of *Czaplicki*, the Court said (p. 960):

"*Czaplicki* is clearly distinguishable and, as we pointed out in *Sabol v. Merritt Chapman & Scott Corp.*, 241 F.2d 765, 768 (2d Cir. 1957), 'was carefully limited by the court to the peculiar situation there presented.' It was decided prior to the 1959 amendments of § 33(b). At that time the employee, upon entering into a settlement agreement with his employer and accepting compensation, immediately lost any right to sue the shipowner, since that right, by assignment, became exclusively the right of the employer. However, in *Czaplicki* the employer's insurer,

which by subrogation acquired the employer's exclusive assigned right to sue, was also the shipowner's insurer. Thus, if the insurer brought suit it would as a practical matter not only be suing itself but also be under an obligation to turn over 80% of any recovery in excess of compensation payments and attorney's fees to the employee. In the absence of any right at all on the part of the employee to sue the shipowner, the Supreme Court understandably held that the conflict of interest was sufficient to nullify the assignment, noting that 'Czaplicki's rights of action were held by the party most likely to suffer were the rights of action to be successfully enforced,' 351 U.S. at 530, 76 S.Ct. at 949. . . ."

This Court in *Rodriguez, supra,* concluded that the *Czaplicki* conflict of interest has been substantially undercut, if not overruled by the intent behind the 1972 amendments. In stating that the changes made in the 1972 amendments "balanced the conflicting interests of the vessel owner, the stevedore and the longshoreman," this Court stated at page 1957:

"Three of the 1972 Amendments are pertinent. First, the level of benefits was substantially increased, thereby increasing the likelihood that the statutory compensation recoverable without proof of fault would be adequate. Second, the shipowner's right to seek indemnity from the stevedore under *Ryan Stevedoring* was eliminated, thereby removing a category of litigation from the courts, placing more definite limits on the stevedore's insurance costs, and removing a potential source of conflict between the interests of employers and employees. Third, the shipowner's nearly absolute liability for unseaworthiness was eliminated,

thereby further narrowing the area of potential litigation and increasing the relative importance of statutory awards as the favored method of compensation. See generally *Scindia Steam Navigation Co. v. De Los Santos*, ... U.S. ....., ..., 101 S.Ct. 1614, 1620-1621, 67 L.Ed.2d ..... *In making these changes, Congress necessarily balanced the conflicting interests of the vessel owner, the stevedore, and the longshoreman. As with other problems of interpreting the intent of Congress in fashioning various details of this legislative compromise, the wisest course is to adhere closely to what Congress has written. The meaning of § 33(b) is plain and should be respected.*" (Emphasis supplied.)

The Court below, in strictly construing the provisions of Section 33(b) and ruling that they did not cover the situation in the instant case, did so largely because, in its view, the conflict of interests between the longshoreman and the stevedore would reduce the probability that the latter would protect the rights of the former. (Joint App. 45). That this apprehension is not justified is set forth in the *Rodriguez*, *Hernandez*, *Perez* and *Bandy* decisions, *supra*, which we have discussed at some length (Br., pp. 23-35). The conflict of interest, here, is not only the type which Congress had in mind in enacting the 1959 amendments, but those amendments, together with those enacted in 1972, balanced the interests of the three parties involved. In the case at bar the Court below was dealing with the classic relationship between the longshoreman and his employer without the complexity of the *Czaplicki* situation. It should have interpreted the provisions of Section 33(b) in the light of that classic situation and, in the absence of unusual conflicts of interests, found the existence of the statutory assignment of the respondent's cause of action.

CONCLUSION

The voluntary payment of compensation benefits by his employer to the respondent, plus the acceptance and filing of the required forms by the Bureau of Employees Compensation, Department of Labor, constituted, contrary to the ruling of the Court below, an "award in a compensation order, within the provisions of 33 USC § 933(b)." The conflict of interest between the respondent and his employer was the normal relationship between those parties, which did not operate to invalidate the assignment provision of that statute. The decision below should be reversed and the amended complaint against the petitioner should be dismissed.

Respectfully submitted,

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